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No. 275

In the Supreme Court of the United States

OCTOBER TERM, 1958

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet., App. B) is not yet reported. The findings and order of the Civil Aeronautics Board (R. 8, 21, 24) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1958. The petition for a writ of certiorari was filed on August 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board may fix a standard rate for United States-Tokyo mail carriage based on the mileage flown by a competing airline and apply that rate to petitioner which flies a more circuitous route, so that petitioner's fully allocated costs for such carriage are not defrayed although out-of-pocket expenses are recovered, where the Board found that petitioner's net revenue position would be benefited since, if the rates were not "equalized", it would lose this traffic to the competing airline.

STATUTES INVOLVED

Pertinent provisions of the Civil Aeronautics Act, and Reorganization Plan No. 10 of 1953, are set forth in the Appendix, *infra*, pp. 12-15.

STATEMENT

The petitioner operates world-wide air routes for the transportation of persons, property and mail, under certificates of public convenience and necessity issued by the Civil Aeronautics Board. Certain of its routes extend from San Francisco and Seattle, on the one hand, to Tokyo on the other, via Hawaii and other Pacific Islands, and these routes are a part of the carrier's Pacific Division.[1] Northwest Airlines, Inc., also conducts air operations between Seattle and Tokyo, but via the more direct "Great Circle" route.

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[1] The Pacific Division also encompasses routes west of Hawaii to points in Australia and India. There are three other divisions of the carrier: the Atlantic, Alaska, and Latin American divisions.

The Northwest and Pan American routes to Tokyo are fully competitive for United States traffic generally, and passenger and cargo rates are uniform despite the more circuitous Pan American routing and the fact that it serves California cities, whereas Northwest does not.

Rates for the transportation of mail are fixed by the Board pursuant to Section 406 of the Civil Aeronautics Act (*infra*, pp. 12-13), and may include a subsidy. See, *e.g.*, *Delta Air Lines* v. *Summerfield*, 347 U.S. 74. Prior to 1953, all mail rates, whether embodying a subsidy element or fixed only at a compensatory level, were "paid by the Postmaster General from appropriations for the transportation of mail by aircraft" (Section 406(a), *infra*, p. 12), and the Board was not required to differentiate between the subsidy and compensatory (or "service") portions of the rate. Moreover, since all rates were paid from the Postmaster General's appropriations, rate differentials between various carriers seldom were an important factor in his distribution of mail between carriers. However, Reorganization Plan No. 10 of 1953 (*infra*, pp. 13-15) required a separation of subsidy from service pay, with the Postmaster General paying the service portion of the rate, and the Board the subsidy. The practical effect was that, for subsidized carriers, the Board must fix what are, in substance, two mail rates.[2]

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[2] Prior to 1953, subsidy rates generally were fixed in terms of mileage flown as opposed to mail actually transported, whereas compensatory or service rates were fixed in terms of a specific rate for each pound (per ton-mile) actually

Shortly after the effective date of Reorganization Plan No. 10, the Postmaster General announced his intention to use the carrier which charged him the lowest rate when air mail service would not be impaired. Consequently, to insure an over-all equitable distribution of mail at fair and reasonable rates, to provide maximum mail service, and to guard against subsidy-free carriers obtaining the bulk of the mail with the Board being required to make up the loss to the subsidized carriers in the form of increased subsidy, it became necessary to provide uniform rates for the same services to the Post Office Department. The present controversy stems from this practice, and represents the only court challenge to the Board's extensive revision of existing mail rates to accomplish rate uniformity for like service.[3]

The Board order here involved (R. 21) in effect made final an earlier temporary order, whereby, for the period April 1, 1955 forward, Pan American's service rate to be paid by the Postmaster General for United States-Tokyo mail was "equalized" with the Northwest rate. Such equalization was accomplished by providing that the rate for Tokyo mail shall be computed "on a standard mileage of 5078 miles" (R. 23), which mileage is the distance flown by

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transported. Mail rates continue to be fixed in the same fashion except that, for subsidized carriers, the "subsidy rate" orders now contain a provision for automatic offset of "service" pay received from the Post Office Department.

[3] In the instant proceeding, petitioner voluntarily sought, and obtained, rate "equalization" with United Air Lines for mail transportation between San Francisco and Los Angeles on the one hand, and Honolulu on the other.

Northwest to Tokyo over its more direct routing. The Board's order rests on findings, both as to the past and the future, that equalization (1) precludes a loss of some 90% of the Pan American Tokyo mail to Northwest with a consequent $2,000,000[1] annual mail revenue loss to Pan American (R. 10, 35-37), (2) improves Pan American's net revenue position (R. 10), and (3) benefits the Government both from a service standpoint and in that the amounts of service mail pay received by Pan American from the Post Office Department serve to reduce the carrier's subsidy, whereas no similar savings result in the case of Northwest, a non-subsidized operator (R. 59).

Pan American's out-of-pocket costs for the Tokyo mail are around $31,000 annually, about 1% of fully allocated operating expenses (R. 38). On a fully allocated basis, the rate covers 89% of the costs of Tokyo mail. As to the entire Pacific Division, the total yield of all the service mail rates exceeds the fully allocated costs of the entire Pacific mail service, and contributes a small return on allocated investment. For the period April 1, 1955 through September 30, 1956, Pan American received a substantial amount of subsidy for its entire system operations, and any redetermination of the present rate for that period would not provide additional revenue to petitioner but rather would result only in adjustments in appropriations between the Board and the Post

[1] Pan American carries approximately one-third of the Tokyo mail, and the Post Office Department made plain that about 90% of this amount would have been, and will be, shipped by Northwest in the absence of equalization (R. 12).

Office Department. See note 2, *supra*, p. 3. Pan American's entitlement to subsidy for the period October 1, 1956 forward has not been determined. If no subsidy is provided, it will receive as compensation for transporting mail only the aggregate of the various service rates for all of its routes and divisions.

The Court of Appeals affirmed the Board's order as to the equalization feature (Pet., App. B).[3] The court held that Pan American had not shown the rate to be unfair and unreasonable as applied to it; that the Board properly took into account the fact that Pan American would be better off with rate equalization than without it; that a carrier "may be required to charge for a particular service a rate that is not fully compensatory, in the sense that it does not cover fully allocated costs and return"; and that there was no showing of a taking of property without just compensation in that no contention was made of loss on the over-all Tokyo operations, which include the carrying of passengers and freight as well as mail.

ARGUMENT

Contrary to petitioner's suggestion (Pet. 11), this case involves no question of whether the Government can "commandeer mail service without any

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[3] Pan American contended below that the Board in any event should have allowed a rate differential for the savings to the Post Office Department of costs for transportation between San Francisco and Seattle of San Francisco mail shipped by Pan American, a matter as to which the record did not provide an adequate basis for computation. The court remanded the case to the Board to ascertain the volume of mail in this category, and to revise the rate accordingly.

compensation" by requiring a carrier to apply profits from other traffic to support mail transportation. Rather, the court below held only that the statutory requirement that mail rates be "fair and reasonable" (Section 406(a); *infra*, p. 12), does not always preclude, nor did it in the circumstances of this case preclude, the prescription of a particular mail rate at a level below fully allocated costs and full return on allocated investment.[6]

In contending that Section 406 immutably precludes the fixing of such a rate where the carrier objects, petitioner places mistaken reliance on *Northern Pacific Railway Co.* v. *North Dakota*, 236 U.S. 585. That case did not hold that so-called "below cost" rates can never be prescribed. Rather, as pointed out in *B. & O. R. Co.* v. *United States*, 345 U.S. 146, 149, the ground for decision in *Northern Pacific:*

> was that the rates were "unreasonable" and "arbitrary". The Court was careful to point out and emphasize that there was nothing in the records of those cases to show that there were "reasonable" grounds on which to justify imposing non-compensatory rates on the railroads.

Here, as the Court of Appeals held, there were reasonable grounds in that petitioner "is better off by reason of the 'equalized' rate" since it otherwise would be in a worse net revenue position through the

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[6] The Board recognizes that each category of traffic should bear its proportionate share of joint costs where reasonably feasible, and that there must be valid reasons, found by the court to exist here, to justify a departure from that principle.

loss of the mail traffic to its competitor Northwest. Despite petitioner's attempt to distinguish them, the decisions of this Court recognize that, in fixing rates, agencies properly may consider the effect of the rate on the revenue position of the carrier, and require rates over the carrier's protest which will yield a greater dollar return even though they are not fully "compensatory" in the sense in which petitioner contends. *Hudson & Manhattan R. Co.* v. *United States*, 313 U.S. 98, 99; *Market Street Ry. Co.* v. *Railroad Commission of California*, 324 U.S. 548, 557, 563, 566. Such rates are "fair and reasonable", as are other such rates where there are valid public interest considerations which dictate them and where the carrier's over-all business is not required to be conducted at a loss. *B. & O. R. Co.* v. *United States*, 345 U.S. at 150.

Nor are these principles rendered inapplicable to mail rates because the Government is the shipper and because there is a duty to carry mail. Air carriers are required to maintain and provide adequate service to all classes of traffic. 49 U.S.C. 484(a). Just compensation for the transportation of mail is required, as it is in the case of other traffic. But acceptance of this fact does not lead to the conclusion that a mail rate must be established solely on the basis of cost formulæ. Other considerations may be taken into account in the mail rate field, just as they are in other rate situations. In *United States v. Jones*, 336 U.S. 641, the contention was that a carrier had been denied just compensation for the transportation of mail where there was a mandatory duty to trans-

port and where, as here, the agency was required to fix "fair and reasonable rates" for such transportation. The rate fixed by the Interstate Commerce Commission was a class rate (*i.e.*, one applicable to all carriers of a given category), and the lower courts on three separate occasions had held the rate to be too low in relation to the claimant (336 U.S. at 645, 646). There, as here, the contention was that the rates "do not afford just compensation under the Fifth Amendment on the ground that they do not provide for payment of the cost of the service rendered plus a reasonable return upon invested capital allocated to that service" (336 U.S. at 646). The Commission had taken into account many other factors, such as comparisons with freight rates, compensation received from other services in passenger-train cars, and the mail rates received by other carriers for like services. This Court upheld the rate, pointing out, *inter alia*, that the Commission could "consider rates paid to other carriers or their effects" (336 U.S. at 664).[7]

Finally, decisions such as *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, and *B. & O. R. Co.* v. *United States*, 345 U.S. 146, cited and relied upon by the Court of Appeals, show that, in order successfully to challenge a rate, more is re-

[7] Under petitioner's view, the Board could not fix class rates at any level other than the one necessary to fully compensate the highest cost of carriers of the class, despite the power conferred by Section 406 to fix class mail rates and the prior recognition by this Court of the importance of such rates as a regulatory device. *T.W.A.* v. *Civil Aeronautics Board*, 336 U.S. 601, 606-607.

quired than to assert that an erroneous legal theory has been applied or that the particular rate, viewed in isolation, is "below cost." The question is one of over-all impact and effect. As the Court of Appeals pointed out, "PAA does not contend it will lose money on its over-all Tokyo business, which includes carrying passengers and freight as well as mail." For the period April 1, 1955 through September 30, 1956 the Board's rate actually has no impact at all on petitioner since, as previously pointed out (*supra*, p. 5), the carrier received substantial subsidy payments and any recomputation of the rate for that period would result only in adjustments of appropriations between the Board and the Post Office Department. Whether additional mail pay in the form of subsidy will be provided after October 1, 1958 is problematical. If subsidy is provided, again the instant rate will have no practical adverse effect on petitioner. If there is no subsidy, the Board's determination that the carrier is economically self-sufficient necessarily will constitute a finding that petitioner's operations, viewed in their entirety, are yielding an over-all fair return. And apart from these considerations, there is no Fifth Amendment taking where, as here, the Board has found, and its finding has been upheld, that the carrier is financially "better off" by reason of the "equalized" rate which it attacks.

CONCLUSION

The decision below is correct, there is no conflict of decision, and no substantial question warranting review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1958.

APPENDIX

The relevant provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended (49 U.S.C. 401, *et seq.*), are:

RATES FOR TRANSPORTATION OF MAIL.

Authority to Fix Rates

SEC. 406. [52 Stat. 998, 49 U.S.C. 486] (a) The Authority [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Rate-Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

* * * *

Reorganization Plan No. 10 of 1953 (67 Stat. 644) provides:

Payments to Air Carriers

SECTION 1. *Transfer of functions.*—There are hereby transferred to the Civil Aeronautics

Board (hereinafter referred to as the "Board") the functions of the Postmaster General with respect to paying to each air carrier so much of the compensation fixed and determined by the Board under section 406 of the Civil Aeronautics Act of 1938 (52 Stat. 998, as amended, 49 U.S.C. 486), as is in excess of the amount payable to such air carrier, under honest, economical, and efficient management, for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith at fair and reasonable rates fixed and determined by the Board in accordance with that section without regard to the following provision of subsection (b) thereof: "the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the postal service, and the national defense."

SEC. 2. *Interim provisions.*—The Board may fix, without prior notice and hearing, the initial rates to be paid by the Postmaster General under this reorganization plan for mail-transportation services rendered on and after the date when the plan becomes effective. At any time thereafter the Board upon its own motion may, and upon the petition of the Postmaster General or the carrier concerned shall, institute new proceedings to fix and determine, after notice and hearing, the rates to be paid by the Postmaster Gen-

eral in accordance with section 1 of this reorganization plan, and the rates so fixed and determined shall supersede the initial rates from the date of the motion or petition.

SEC. 3. *Incidental transfers.*—There shall be transferred from the Post Office Department to the Board so much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds, employed, held, used, available, or to be made available in connection with the functions transferred by this reorganization plan as the Director of the Bureau of the Budget deems to be required for the performance of those functions. Such measures and dispositions as the Director of the Bureau of the Budget shall deem to be necessary in order to effectuate the transfers provided for in this section shall be carried out in such manner as he shall direct and by such agencies as he shall designate.

SEC. 4. *Effective date.*—The provisions of this reorganization plan shall take effect on the first day of the first calendar month following forty-five days after the date they would take effect under section 6 (a) of the Reorganization Act of 1949, as amended, in the absence of this section, and shall be applicable only with respect to services rendered on and after the date on which the reorganization plan takes effect under this section.

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